Perwira Affin Bank Bhd v Mohan Arunasalam Arulgnanam and another action

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D3–29–9328 OF 1990
ARIFIN JAKA J
2 DECEMBER 1999

Bankruptcy *— Creditor's petition — Judgment creditor claimed for sum payable as at date of filing of bankruptcy notice — Whether judgment creditor entitled to full payment of judgment sum including accrued interest calculated from date of bankruptcy notice until date of full payment — Whether judgment debtors have satisfied court that they are able to pay debts — Bankruptcy Act 1967 ss 3(1), 6(3) & 40(3)*

The judgment creditor obtained a final judgment on 8 April 1988 against the judgment debtors. Based on the judgment, the judgment creditor issued a bankruptcy notice dated 20 December 1990 against the judgment debtors. On 27 April 1992, the judgment creditor issued a creditors' petition against the judgment debtors. The amount claimed by the judgment creditor in the petition is the sum of RM39,578.94 being the aggregate sum which was payable to the judgment creditor as at 20 December 1990, the date of filing the bankruptcy notice. On 4 September 1997, the senior assistant registrar heard and dismissed the petitions on the ground that he is satisfied that the judgment debtors are able to pay the debts. The judgment creditor appealed. The issues were: (i) whether the judgment creditor are entitled to full payment of the judgment sum including accrued interest calculated from the date of bankruptcy notice until date of full payment under the terms of the judgment on which the bankruptcy notice was based; and (ii) whether the judgment debtors have satisfied the court that they are able to pay their debts that would justify the court to dismiss the petition.

Held, dismissing the appeal:

The judgment creditors are entitled to payment of the amount which has been stated in the petition which is based on the bankruptcy notice. The continuing interest on the judgment debt which accrued after the date of the bankruptcy notice constitutes a debt provable in bankruptcy under s 40(3) of the Bankrutpcy Act 1967 after the judgment debtors are declared bankrupt. These are debts to be proved before the official assignee after the receiving and adjudication orders are pronounced (see p 735H–I, D). In the instant case, the debtors are prepared to pay the amount as stated in the bankruptcy notice and in the petition (see p 736C).

[Bahasa Malaysia summary

Pemiutang penghakiman telah memperolehi penghakiman muktamad pada 8 April 1998 terhadap pemiutang penghakiman. Berdasarkan

penghakiman tersebut, pemiutang penghakiman telah mengeluarkan suatu notis kebankrapan bertarikh 20 Disember 1990 terhadap penghutang-penghutang penghakiman. Pada 27 April 1992, pemiutang penghakiman telah mengeluarkan petisyen pemiutang terhadap penghutang-penghutang penghakiman. Jumlah yang dituntut oleh pemiutang penghakiman di dalam petisyen adalah jumlah RM39,578.94 yang merupakan jumlah agregat yang perlu dibayar kepada pemiutang penghakiman sehingga 20 Disember 1990, tarikh memfailkan notis kebankrapan. Pada 4 September 1997, penolong kanan pendaftar telah mendengar dan menolak petisyen atas dasar bahawa beliau berpuas hati bahawa penghutang-penghutang penghakiman boleh membayar hutang-hutang tersebut. Pemiutang penghakiman telah merayu. Isu-isu adalah: (i) sama ada pemiutang penghakiman berhak kepada pembayaran penuh jumlah penghakiman tersebut termasuk faedah yang terakru dikira dari tarikh kebankrapan sehingga tarikh pembayaran penuh di bawah terma-terma penghakiman di mana notis kebankrapan didasarkan; dan (ii) sama ada pemiutang penghakiaman telah memuaskan mahkamah bahawa mereka boleh membayar hutang-hutang mereka yang menjustifikasikan mahkamah untuk menolak petisyen tesebut.

Diputuskan, menolak rayuan tersebut:

Pemiutang penghakiman berhak kepada pembayaran jumlah tersebut yang telah dinyatakan di dalam petisyen yang berdasarkan notis kebankrapan tersebut. Faedah yang berterusan di atas hutang penghakiman yang terakru selepas tarikh notis kebankrapan terjumlah kepada suatu hutang yang perlu dibukti di dalam kebankrapan di bawah s 40(3) Akta Kebankrapan 1967 selepas penghutang penghakiman diisytiharkan sebagai muflis. Ini adalah hutang-hutang yang perlu dibukti di hadapan pegawai pemegang harta selepas perintah penerimaan dan penghukuman diputuskan (lihat ms 735H–I, D). Di dalam kes ini, penghutang-penghutang bersedia untuk membayar jumlah tersebut seperti yang dinyatakan di dalam notis kebankrapan dan di dalam petisyen (lihat ms 736C).]

Notes

For cases on creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1626–1635.

Cases referred to

A Debtor, Re (No 231 of 1936), The Debtor v The Petitioning Creditors and the Official Receiver [1936] 3 All ER 641 (distd)

Fawzia bte Osman v Bank Bumiputra (M) Bhd and another appeal [1991] 1 MLJ 426 (refd)

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1), 6(3), 40(3)
Bankruptcy Rules 1969 rr 178–187

KL Wong (*Nik Hussain & Partners*) for the appellant.
Azman Karim (*Clough Thuraisingham & Jeya Mahesan*) for the respondent.

Arifin Jaka J: This is an appeal from the decision of the learned senior assistant registrar (SAR) dated 4 September 1997 dismissing the creditor's petition with costs.

The facts so far as they are material for the purpose of this appeal are these. Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank (M) Bhd)('the judgment creditor') obtained a final judgment on 8 April 1988 against Muhaimi bin Ahmad Mustapha and Mohan Arunasalam ('the judgment debtors') vide High Court Kuala Lumpur (Commercial Division) Suit No C–24–3748–86 for payment of the sum of RM34,078.53 with interest at the rate of 16.5% pa on monthly rests till date of full settlement and RM350 costs. Based on this judgment, the judgment creditor issued a bankruptcy notice dated 20 December 1990 separately against the judgment debtors. The notice was served on both judgment debtors. The demand for payment in the bankruptcy notice against each of the judgment debtor is for payment within seven days after service of the notice excluding the day of such service was for 'the sum of RM39,578.94' as being the amount due as at 20 December 1990 as shown in the 'Particulars' therein. The act of bankruptcy relied upon by the judgment creditor was the judgment debtors' failure to comply within seven days of service of the notice as provided under s 3(1) of the Bankruptcy Act 1967 ('the Act'). On 27 April 1992, the judgment creditor issued a creditor's petition against the judgment debtors separately (vide Bankruptcy No D3–29–9328–90 — Mohan Arunasalam Arulgnanam s/o Arunasalam and vide Bankruptcy No D3-29-9330-90 — Muhaimi bin Mustapha). In the petition, the amount claimed by the judgment creditor is the sum of RM39,578.94 being the aggregate sum which was still justly and truly due and payable to the judgment creditor as at 20 December 1990, the date of filing the bankruptcy notice. The petitions were served on both the judgment debtors.

By an order of court dated 21 July 1994, the petitions were consolidated and heard together. On 4 September 1997, the SAR heard and dismissed the petitions on the ground that he is satisfied that the judgment debtors are able to pay the debts. At the hearing before me, counsels for both parties agreed that the only issue to be decided is whether the judgment creditor in this case is required under the law to accept the sum as stated in the bankruptcy notice or is entitled to full payment of the judgment sum including accrued interest calculated from the date of bankruptcy notice until date of full payment under the terms of the judgment dated 8 April 1988 on which the bankruptcy notice is based.

It is the judgment creditors' case that they are entitled to claim further interest on the judgment sum from the date of bankruptcy notice until the date of receiving and adjudicating orders are made against the judgment

A debtors. They argued therefore that the judgment debtors have to pay the amount inclusive of accrued interest calculated from 20 December 1990 ie date of bankruptcy notice to date of full realisation to avoid the adjudication and receiving orders be made against them at the hearing of the petitions.

In the support of this contention, the learned counsel relied on s 40(3) B of the Act which reads as follows:

> Save as provided under sub-ss (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

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It is further contended by the learned counsel that this section preserves the right of a judgment creditor to claim for the continuing interest. With the greatest respect, I disagree with the contention of the learned counsel. Section 40(3) of the Act deals with debts provable in bankruptcy and such debts and the proof of such debts are governed by rr 178–187 of the D Bankruptcy Rules 1969. These are debts to be proved before the official assignee after the receiving and adjudication orders are pronounced. The section must be read on its own and it concerns the debts which would include the accrued interests calculated from the date of the issue of the bankruptcy notice up to date of full realisation. It is not the debt that is E referred to under s 6(3) of the Act which I shall refer to in detail later in this judgment.

The learned counsel also referred to *Re A Debtor (No 231 of 1936), The Debtor v The Petitioning Creditors and the Official Receiver* [1936] 3 All ER 641. This case dealt with the sum of postponed interest which was claimed by the petitioning creditor in addition to a claim for the balance of principal F of certain loans with interest at 5%. The postponed interest claimed is provided for under s 9(1) of the English Money Lenders Act 1927. The debtors tendered the balance of the principal interest at 5% and costs but not the postponed interest and contended that this was sufficient for dismissal of the petition. The registrar rejected this contention and made a receiving order against the debtor. On appeal, it was held by the Court of G Appeal that there was not sufficient cause for the dismissal of the petition because the postponed interest was in law owing by the debtor and recoverable in bankruptcy proceedings after all other debts were paid in full. The facts in this case are different from the facts in our instant case in that the postponed interest in that case is a debt payable by the debtor under a H special provision in the Moneylenders Act 1927 which preserves the right of a money lender to claim for the postponed interest as stated in the petition. There is no such provision in our system and that case is not applicable to the facts in our instant case. For this reason, I am of the view that the judgment creditors are entitled to payment of the amount which has been stated in the petition which is based on the bankruptcy notice which stated I the sum payable by the judgment debtors. The continuing interest on the judgment debt which accrued after the date of the bankruptcy notice constitutes a debt provable in bankruptcy under s 40(3) of the Act after the judgment debtors are declared bankrupt.

The next issue to be considered is whether the judgment debtors have satisfied the court that they are able to pay their debts that would justify the court to dismiss the petition. This calls for an examination of s 6(3) of the Act which states:

> If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, *or is satisfied by the debtor that he is able to pay his debts,* or that for other sufficient cause no order ought to be made, the court may dismiss the petition. (Emphasis added).

Under this section, it is clearly provided, inter alia, that the court may dismiss the petition if it is satisfied that the debtor is able to pay his debts. The court is vested with the discretion to dismiss the petition and the discretion is to be exercised if there is evidence that the debtors are able to pay the debt. In the instant case the debtors are prepared to pay the amount as stated in the bankruptcy notice and in the petition. To my mind, this is an obvert act on the part of debtors to show that they are able to pay the debts claimed but the judgment creditor are not willing to accept the amount.

To my mind, the judgment debtors are only liable to pay the sum of RM39,578.94 being the amount due as at 20 December 1990, as stated in the bankruptcy notice and petition. It is trite law that the amount demanded in the bankruptcy notice must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period and that at the time of issue of the bankruptcy notice, the judgment creditor must be in a position to issue execution (see *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 which was followed in *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426).

In the instant case, the amount stated in the bankruptcy notice are quantified and the judgment debtors are right in not disputing this on the authority of *Lee Mun* and *Fauzia*. The judgment debtors are not disputing that an act of bankruptcy had been committed by them for non compliance of the bankruptcy notice in failing to pay the amount demanded within the seven-day period. What they say is that they are able to pay the amount claimed as stated in the notice which was rejected by the judgment creditor.

The question is whether the judgment debtors have satisfied the court that they are able to pay their debts which would justify the dismissal of the petition. Under the circumstances of the case I am satisfied that the judgment debtors have satisfied the court that they are able to pay their debts.

Accordingly, for the reasons stated above, I dismissed the appeal and confirm the order of the learned SAR.

Appeal dismissed.

Reported by Benjamin Yong

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